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No. 99-1412

Supreme Court, U.S.
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In The
Supreme Court of the United States

In Re: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.,
Debtor,

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.
Petitioner,

v.

CAPITAL SKIING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fourth Circuit Court of Appeals erred in upholding the decision of the United States District Court for the Eastern District of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division failing to accord full faith and credit to a decision of the Warren County Circuit Court holding a foreclosure sale void.

Whether the Fourth Circuit Court of Appeals erred in upholding the decision of the United States District Court for the Eastern District of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division finding that Appellee's "title" was superior to the Appellant even though the Appellee was holding title through a void foreclosure and denying all damages as a result of this wrongful possession that put Appellant out of business.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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JURISDICTION

Review on *Writ of Certiorari* is a matter of judicial discretion and will be granted for compelling reasons only. The petitioner has given no compelling reason to justify this Court's exercise of its discretionary jurisdiction.

This petition does not involve a conflict among federal courts, a conflict among state courts of last resort involving a federal question, or the decision of a state court or a United States court of appeals on an important question of federal law which should be settled by this Court, or conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

This petition seeks this Court's review of the Fourth Circuit's opinion sitting *en banc*, affirming a judgment of the district court which affirmed a decision rendered by the bankruptcy court in favor of Capital Skiing Corporation, "Capski". This decision denied Cherokee Corporation of Linden, Virginia, Inc.'s, "Cherokee", claims for unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships and punitive damages.

A. Procedural History

A full procedural history of this case was included in Cherokee's Petition for *Writ of Certiorari* pages App. 5-8 and is incorporated herein.

B. The Dispute

Cherokee asserts that the Fourth Circuit denied its claims because it failed to accord full faith and credit to a decision of the Warren County Circuit Court holding a foreclosure sale void. This failure allegedly caused the Fourth Circuit to uphold the bankruptcy court's dismissal of

Cherokee's claims of unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships. Cherokee maintains that had the Fourth Circuit given the Warren County Circuit Court's judgment preclusive effect it would have overruled the bankruptcy court's ruling. This is a non sequitur.

The real issue presented in this petition is whether title to property is relevant to claims of unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships.

Capski does not dispute that 28 U.S.C.A. §1738 directs federal courts to give full faith and credit to state court judgments but this precept has no application to this case. The bankruptcy court heard the evidence and made extensive findings of fact and conclusions of law on each of Cherokee's claims. Cherokee does not dispute a single finding of fact. The bankruptcy court's conclusions of law were based on Virginia Code §8.01-124 and Virginia case law. These conclusions of law were affirmed by the district court and the Fourth Circuit Court of Appeals, *en banc* and do not involve a federal question, a conflict among court of appeals, or an important question of federal law that should be decided, or conflict with relevant decisions of the U.S. Supreme Court.

After a full trial on the merits, the bankruptcy court dismissed Cherokee's claims.

1. Unlawful Detainer.

Virginia Code §8.01-124 provides for a judgment after a finding of unlawful entry or detainer. To prevail, Cherokee must prove Capski forcibly or unlawfully maintained the land without a right to do so, without Cherokee's consent, and withheld possession from Cherokee. Because the Warren County Circuit Court held the foreclosure sale was void, Cherokee contends Capski's possession of the property between November 30, 1992 (foreclosure sale date) and January 20, 1995 (void date) was

unlawful. The determination as to whether the holding was unlawful does not require a finding that Capski had proper title to the property, *Davis v. Mayo*, 82 Va. 97, 99 (1886). This cause of action requires the Court to determine that possession is "rightful or wrongful [as] against the unlawful invasion and to afford summary redress and restitution." Citing *Southern Ry Co. v. Lima Wood*, 156 Va. 829, 159 S.E. 69 (1931); *Olinger v. Shepard*, 12 Gratt (53 Va.) 462 (1855). Cherokee chose to prosecute an unlawful detainer action against Capski, not an ejectment action. It is bound by the consequences.

Title to real property is required to maintain a successful ejectment action, but not an action for unlawful detainer. Evidence of title is often inadmissible in trials of unlawful detainer. *Allen v. Gibson*, 25 Va. (4 Rand.) 468 (1826). Virginia case law is unclear whether the purchaser of property at a trustee auction is vested with proper title during the period before the sale is invalidated because it was improperly conducted, but proper title is irrelevant because lawful possession is the issue to be determined in a claim of unlawful detainer (Petition for *Writ of Certiorari,* App. 12), *emphasis added.* At no time did the state court find that Capski's possession was unlawful. (Petition for *Writ of Certiorari,* App. 11)

The bankruptcy court also found that Cherokee did not prove Capski unlawfully held the property between the date the sale was found to be invalid (January 20, 1995) and the date of the second foreclosure (October 5, 1996). The court specifically found that Capski had not prevented Cherokee from regaining possession of the property. Accordingly, Cherokee's claims for unlawful detainer for the time period while Capski rightfully held the property, and for the time period after the sale was voided until the second foreclosure, were denied.

2. *Unjust Enrichment.*

Title to real property is not an element of an unjust enrichment claim. Virginia case law requires proof of three (3) elements. First, Cherokee must show it conferred a benefit to Capski; second, Cherokee must show that Capski knew the benefit was conferred; and third, Cherokee must show that Capski accepted and retained the benefit under circumstances that would render it inequitable for Capski to retain the benefit without paying Cherokee for its value. *Nossen v. Hoy*, 750 F.Supp. 740, 744-45 (E.D. Va. 1990); see *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985, 993 (4th Cir.), cert. denied, 498 U.S. 982 (1990).

After hearing all the evidence, the bankruptcy court found that Cherokee offered no evidence to prove any of the elements of this claim. Instead, the evidence showed that as of July 1992 Cherokee was indebted to Capski for over one million dollars ($1,000,000.00) and Capski held a Deed of Trust and Note on the property. To protect its interest in the property, Capski paid insurance and real estate property taxes. It also employed a Mr. Pickrell to patrol the property at a salary of $1,000.00 per month. The court held that payment of these expenses without any benefit to Capski defeated Cherokee's claim for unjust enrichment.

3. *Tortious Interference with Prospective Business Advantages or Business Relationships.*

Title to real property is not an element of a tortious interference with prospective business advantages or business relationships claim. To prove this claim, Cherokee must show: (1) the existence of a valid business expectancy with probability of future economic profit; (2) Capski's knowledge of the expectancy; (3) a reasonable certainty that absent Capski's misconduct, Cherokee would have realized the expectancy; and (4) damage to Cherokee. *Commercial*

Business Systems, Inc. v. Halifax, 253 Va. 292, 302, 484 S.E.2d 892, 987 (1997).

The bankruptcy court found that Cherokee was insolvent and was not operating a business. It found there was no evidence the business would have gone forward even if the sale had not been conducted. And it also found no evidence of Capski's misconduct or damage to Cherokee

For these reasons, Cherokee's claim of tortious interference with prospective business advantages or business relations and punitive damages were denied.

REASONS FOR DENYING THE WRIT

Cherokee has given no compelling reason for this Court to exercise its discretionary jurisdiction. There is no split among the circuits. There is no conflict among state courts of last resort involving a federal question. There is no important question of federal law which should be addressed by this Court.

Cherokee claims its *Writ of Certiorari* should be granted because the Fourth Circuit Court of Appeals failed to follow the dictates of 28 U.S.C.A. §1738 directing federal courts not to employ their own rules of *res judicata* in determining the effect of state judgments. Cherokee claims that if the Warren County Circuit Court's judgment holding a foreclosure sale void had been given preclusive effect, the Fourth Circuit Court of Appeals would have overruled the decisions of the bankruptcy court. This argument is a non sequitur. Even if the Fourth Circuit Court of Appeals did fail to follow the dictates of §1738 this fact alone does not prove the *prima facie* elements of Cherokee's claims.

Title to real property is a relevant issue in actions for ejectment. Lawful possession, not proper title, is the gravamen of an unlawful detainer action. Title to real property is not an element of an unjust enrichment claim, or a tortious interference with prospective business advantages or business relationships claim. Therefore, the Warren County Circuit Court's ruling does not in itself prove any of

Cherokee's claims. In addition, the bankruptcy court expressly found that Cherokee offered no evidence at trial to prove the required elements of these claims.

CONCLUSION

This case presents a state law question only. There is no conflict among the circuits and it does not involve an important federal question. For these reasons, this case does not merit further review by this Court and Cherokee's petition should be denied.

Respectfully submitted,

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